In the United States Court of Appeals for the Ninth Circuit

No. 14081

LAWRENCE E. PARKER, ET AL., APPELLANTS

*v.*

J. A. LESTER, ET AL., APPELLEES

*ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION*

# BRIEF FOR APPELLEES


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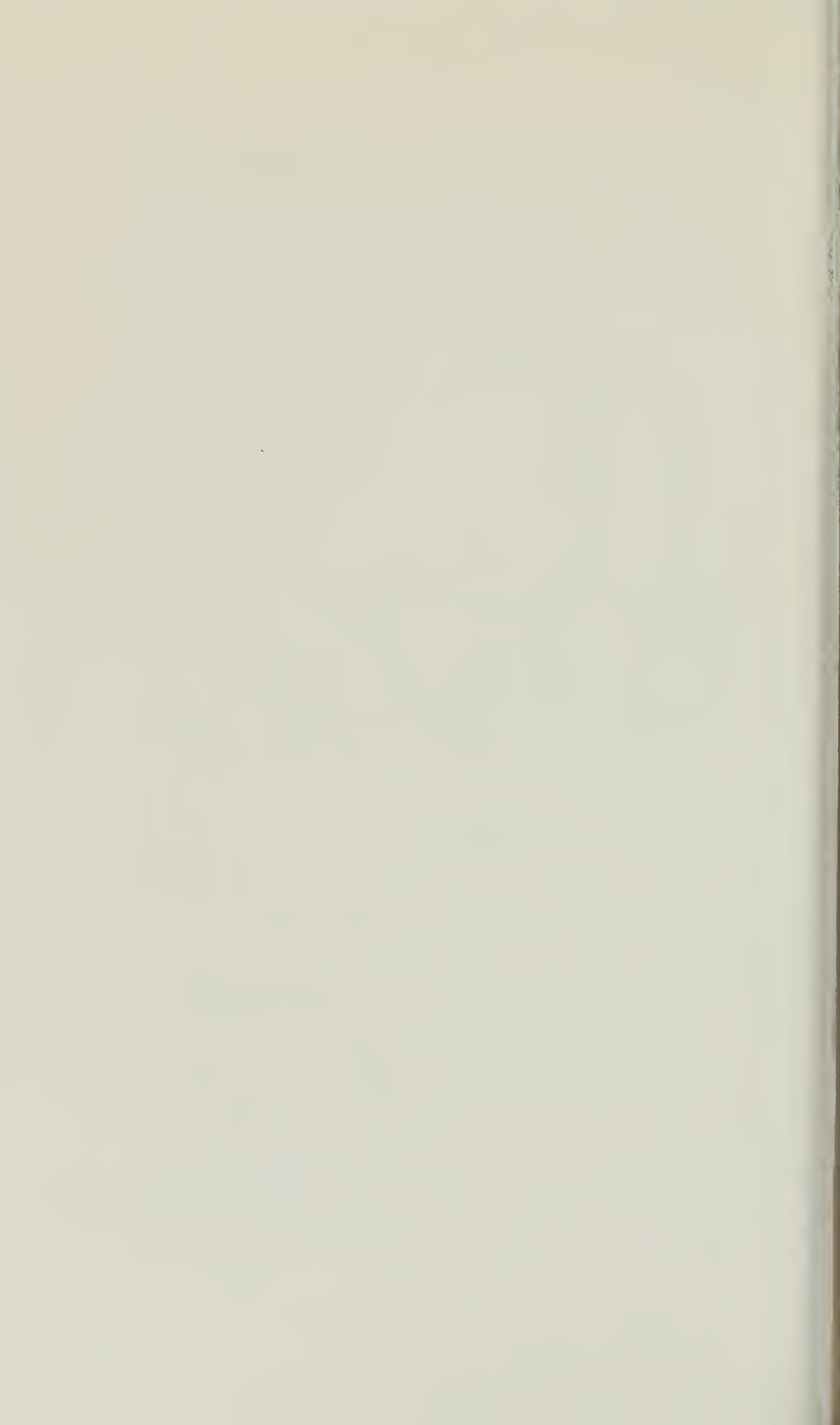

# In the United States Court of Appeals for the Ninth Circuit

No. 14081

Lawrence E. Parker, et al., appellants

*v.*

J. A. Lester, et al., appellees

*APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION*

## BRIEF FOR APPELLEES

### STATEMENT OF THE CASE

This is an appeal by the plaintiffs below from a decree of the District Court granting them partial relief (Tr. 336-40).[1] The decision of the court below (Tr. 276-302) is reported as *Parker* v. *Lester,* 112 F. Supp. 433.

Appellants are merchant seamen who brought this action for injunction and declaratory judgment on behalf of themselves and others of their class to challenge

[1] Appellees also filed a notice of appeal pending decision by the Solicitor General as to whether an appeal should be prosecuted but now acquiesce in the decree and have not pursued their appeal.

the validity and constitutionality of the so-called Magnuson Act (Act of August 9, 1950, 64 Stat. 427, 50 U.S.C. 191) and the executive orders and regulations of the United States Coast Guard issued pursuant thereto.

Appellees, defendants below, are officers of the Coast Guard and of the Army who enforce in the San Francisco area the security clearance program challenged by appellants.[2]

*The Magnuson Act.* This act, enacted in 1950 during the Korean crisis, authorizes the President, whenever he finds that the security of the United States is endangered by subversive activities (among other things), to institute measures to safeguard vessels and ports of the United States from injury from sabotage or other subversive acts.

*The Executive Orders.* On October 18, 1950, the President issued Executive Order 10173 (15 F.R. 7005) in which he found that the security of the United States is endangered by subversive activity and prescribed regulations vesting enforcement of the Act in the Coast Guard and providing that seamen should not be employed on American merchant vessels unless they held validated documents, which the Commandant of the Coast Guard was not to issue unless he was satisfied that the character and habits of a seaman authorize the belief that his presence on board ship would not be inimical to the security of the United States.[3]

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[2] The court below held that the action was moot as to the defendant Army officers (Tr. 276-7; 112 F. Supp. at 436) and appellants do not challenge that holding.

[3] As amended by Executive Order 10277 (August 1, 1951, 16 F.R. 7537) and Executive Order 10352 (May 19, 1952, 17 F.R. 4607).

*The Coast Guard Regulations and Hearing Procedure.* As this Court pointed out in *United States* v. *Gray,* 207 F. 2d 237, the regulations promulgated by the Coast Guard make elaborate provisions for local and national appeal boards to which appeals may be taken from the initial determination of the Commandant by a seaman who has been denied clearance. Clearance is denied where reasonable grounds exist for the belief that the seaman (1) has committed acts of treason, espionage or sabotage; (2) is under the influence of a foreign government; (3) has advocated the overthrow of the Government by force or violence; (4) has intentionally disclosed classified information to unauthorized persons; or (5) is or recently has been a member of or affiliated with an organization designated by the Attorney General as totalitarian, fascist, communist, or subversive (33 C.F.R., § 121.01-13).[4]

A seaman denied clearance is given a written notice of his security denial and may appeal first to a local and then to a national appeal board, each composed of one Coast Guard, one management and one labor member. He may file a written answer and is given advance notice of the time and place of hearing and the names and occupations of the board members (33 C.F.R. § 121.15, 121.17, 121.19, 121.27). The seaman

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[4] All references to 33 C.F.R. are to the 1954 pocket supplement to the 1949 edition.

The seaman initially applies to a local Coast Guard office for security credentials. His application is forwarded to Coast Guard Headquarters in Washington where his name is checked against information in the Coast Guard files, derived chiefly from reports by the FBI and the military intelligence branches. The criteria stated above are applied in making the initial determination by the Commandant as to whether the seaman is granted or denied security clearance (Tr. 398, 400, 402-3, 503).

may challenge any board member (33 C.F.R. § 121.21).

The appeal board has before it the complete record on which the Commandant's initial determination to deny clearance was made (see Tr. 494). The seaman may appear in person and by counsel and may submit testimonial and documentary evidence. The technical rules of evidence are not applicable. The seaman has the option of open or closed hearings. Security information is not disclosed. A transcript is made of the hearing, a copy of which (with any classified information deleted) is given the seaman in the event of an adverse decision (33 C.F.R. § 121.21, 121.23).

The local appeal board sends its recommendation, with any dissent noted, to the Commandant. The complete record is again reviewed and if the initial determination is adhered to, the seaman is notified of his right of further appeal to the national appeal board in Washington. Its procedure is the same as that of the local board (33 C.F.R. § 121.25, 121.27, 121.29).

In all cases the final determination to grant or deny security clearance is made by the Commandant (33 C.F.R. § 121.31).

Appellants challenged below and challenge here the authority and constitutionality of the hearing procedure under the Coast Guard regulations on various grounds: that the appeal board hearings provided seamen are not authorized by the Magnuson Act or the executive orders and regulations promulgated thereunder; that the hearings do not conform to the requirements of the Administrative Procedure Act; and that the hearings deny due process to appellants.

*The Decision Below.* After a full trial on the merits the Court below held that the Administrative Proce-

dure Act did not apply to these security hearings, in the light of the exception in that act as to the "conduct of military, naval, or foreign affairs functions" (5 U.S.C. 1004); that the Coast Guard regulations are authorized by the Magnuson Act and that the type of hearing provided by the regulations accorded appellants due process of law except in two respects: (1) a seaman is entitled to be given a statement of the basis of the initial determination by the Commandant of the Coast Guard that he was not satisfied that the seaman is not a security risk with such specificity as to afford him reasonable notice and an opportunity to marshal evidence in his behalf; and (2) a seaman who chooses to appeal a denial of security clearance to the appeal boards is entitled to be given on demand the contents, but not the source, of the testimony against him by a bill of particulars and an opportunity to rebut specific allegations of misconduct or acts or associations which the appeal board considers relevant to the determination that he is a security risk (Tr. 290-9; 112 F. Supp. at 441-4).

*The Decree.* In accordance with this opinion, the court below entered a decree permanently enjoining the Coast Guard officials who administer the security clearance program in San Francisco from giving any effect to a denial of security clearance and from preventing a seaman from being employed on merchant vessels unless the seaman had been given (1) a statement of the basis for the initial determination by the Commandant that such seaman is not entitled to security clearance, "to be worded with such specificity as to afford the seaman reasonable notice of the said basis and an opportunity to marshal evidence in refutation

thereof;" and (2) upon the seaman's demand, a statement of particulars setting forth the acts, associations or beliefs which formed the basis for the determination that such seaman is a poor security risk, "provided however, that such bill of particulars need not set forth the source of such data, nor disclose the data with such specificity that the identity of any informers * * * will necessarily be disclosed" (Tr. 336-9).

This decree further provided that the injunction should apply notwithstanding compliance by the Coast Guard with the requirements for a statement of the basis of initial determination and for a bill of particulars unless such statement and bill of particulars were given "to all merchant seamen in this jurisdiction" on the following conditions:

1. As to merchant seamen previously denied security clearance, they must be given such statement of the basis of initial determination and bill of particulars "within a reasonable time" after entry of the decree; and

2. As to seamen denied clearance after entry of the decree, they must be given such statements "within a reasonable time after security clearance has been denied" (Tr. 339-40).

The decree contained a further proviso that the injunction should not be applicable to seamen who had been denied security clearance "for a reasonable period of time after the signing of the Decree" so as to permit the Coast Guard to initiate proceedings complying with the requirements of the decree (Tr. 340).

*This Court's decision in United States v. Gray.* On September 22, 1953, two months after the entry of the decree below, this Court decided *United States* v. *Gray,*

207 F. 2d 237, involving a similar challenge to the constitutionality of the Coast Guard security clearance procedure. In that opinion this Court expressly agreed with the decision of the court below in the present case and held that the Magnuson Act, the Executive Order, and the Coast Guard regulations issued thereunder were not unconstitutional on their face; that due process did not require that the seaman be given access to the information in the Commandant's file concerning the individual denied clearance or revelation of the names of informants, but that the seaman was entitled to be apprised of the basis for the initial determination with such specificity as to afford him notice and an opportunity to marshal evidence in his behalf; and that at the hearing before the appeal board he was entitled to be informed "of the contents of the showing against him" (207 F. 2d at 241-2).

*The Amendment of the Coast Guard Regulations.* The Government thereupon acquiesced in this Court's decision in the *Gray* case and did not pursue its appeal from the judgment below. Pursuant to that acquiescence, the Coast Guard on October 27, 1953, amended its regulations under the Magnuson Act to provide that any seaman denied security clearance would be given a written notification containing a statement of the basis for the initial determination "worded with such specificity as to afford such person an opportunity to marshal evidence in refutation thereof, and otherwise in his behalf" and that if a seaman appeals to a local appeal board, the board shall give him "a written statement or bill of particulars setting forth the alleged acts, or associations, or beliefs, or other data which formed the basis for the determination that the appellant is a

poor security risk or is not entitled to security clearance," but that the statement or bill of particulars "shall not be worded with such particularity or specificity as to disclose the source of such information or data, nor the identity of any person or persons who may have furnished such information or data" (18 F. R. 6941-2; 33 C. F. R., § 121.15, 121.21).

As to seamen previously denied security clearance, such as appellants, the revised regulations gave them 60 days from November 3, 1953 (subject to extension by the Commandant for good cause) to file a new appeal under which they would receive the procedural rights prescribed by the revised regulations (18 F. R. 6941).

Two appellants, Payney and Kulper, were granted security clearance before this case was decided below (Tr. 283; 112 F. Supp. at 439). The other four appellants have availed themselves of the new appeal granted them by the revised regulations, and their appeals are now in process (Affidavit of Captain James D. Craik, Appendix, pp. 38-42, below).

Appellants in prosecuting this appeal are thus challenging the validity of the *revised* hearing procedure prescribed by the amended regulations notwithstanding the fact that it complies with the opinion (and decree) below which this Court expressly approved in the *Gray* decision. In effect appellants are thus asking this Court to overrule its decision in the *Gray* case.

*Results of the clearance program.* In order that the Court may have an up-to-date picture of the operation of the merchant seamen clearance program, we submit in the appendix to this brief (pp. 42-3 below) the affidavit of Captain James D. Craik, who is in charge of the Coast Guard records of this program, which gives

a tabulation of the number of seamen screened, the number granted clearance at various stages of the administrative process, and the number denied clearance as of May 14, 1954. The figures are:

| | |
|---|---|
| Total Seamen Screened | 392,243 |
| Cleared Initially | 389,097 |
| Denied Initially | 3,146 |
| Appeals by Seamen to Local Appeal Board | 1,817 |
| Cleared | 989 |
| Denied | 668 |
| Appeals to National Appeal Board | 412 |
| Cleared | 205 |
| Denied | 207 |
| Seamen cleared on appeal and then later denied due to further derogatory information | 4 |
| Appeal Board recommendations Overruled by Commandant (Seamen): | |
| (a) Local Appeal Board—Favorable Recommendations | 10 |
| (b) Local Appeal Board—Unfavorable Recommendations | 2 |
| Total Seamen in Denial Status | 1,952 |
| Total Seamen Appeals Pending | 160 |

STATUTE, EXECUTIVE ORDERS, AND REGULATIONS INVOLVED

Appellants' brief sets forth portions of the Magnuson Act (pp. 5-6) and of Executive Order 10173 as amended (p. 7) and certain portions of the Coast Guard regulations, *but not the revisions made to comply with the decree below* (pp. 8-15). The provisions of the revised regulations with respect to the giving of a statement of the basis of the Commandant's initial determi-

nation and a bill of particulars, in the event the seaman appeals, read as follows, with the revisions in italics:

*Denial or revocation of clearance indorsement.* (1) When it is determined by the Commandant that a person to whom security clearance has been denied or is not eligible therefor within the meaning of § 121.13 (d) (or § 125.29 of this chapter for a person denied access to waterfront facilities or vessels), such person shall be so notified in writing. *This written notification shall contain a statement of the basis for the initial determination that he is not entitled to security clearance or that he is a poor security risk.* (33 C. F. R., § 121.15(e)(1).)

* * * * * * *

*The statement of the basis for the action taken under subparagraph (1) or (2) of this paragraph shall be worded with such specificity as to afford such person an opportunity to marshal evidence in refutation thereof, and otherwise in his behalf. This statement shall not be worded with such particularity as to disclose the source of such information or data, nor the identity of any person or persons who may have furnished such information or data, to said person or other persons.* (33 C. F. R., § 121.15(e)(3).)

*Chairman of the Board; duties and responsibilities.* (a) The Chairman of the Board shall keep a list of the names and addresses of the members of the panel and maintain current data with respect to their availability. He shall also make all necessary arrangements incidental to the business of the Board. These arrangements shall include the de-

signation of management and labor panel members to hear each specific appeal, and the designation of alternate panel members when necessary. In carrying out these duties the Chairman of the Board shall:

(1) Accept an appeal from any appellant denied security clearance;

(2) Obtain from the Commandant the complete record in the case;

(3) Furnish the appellant with a written notification stating:

(i) *The basis for the action in the form of a written statement or bill of particulars setting forth the alleged acts, or associations, or beliefs, or other data which formed the basis for the determination that the appellant is a poor security risk or is not entitled to security clearance. This statement or bill of particulars shall not be worded with such particularity or specificity as to disclose the source of such information or data, nor the identity of any person or persons who may have furnished such information or data, to the appellant or to other persons.* (33 C. F. R. § 121.21(a).)

## SUMMARY OF ARGUMENT

I. The two appellants who have been given security clearance have no standing to prosecute this action. The remaining four appellants have administrative appeals pending under the revised Coast Guard regulations, adopted to carry out the decree below and to comply with this Court's opinion in *United States* v. *Gray,* 207 F. 2d 237. The rule requiring exhaustion of administrative remedies before resort to the courts is

applicable here where the administrative remedy first became available after disposition of the case by the trial court. The fact that constitutional issues are involved constitutes a reason for requiring appellants to exhaust their administrative remedies, for they may be cleared by that process, in which event the constitutional problems will no longer exist.

II. The screening program is authorized by the Magnuson Act. This is shown by the Act's legislative history, as Senator Magnuson, the sponsor of the bill, stated that it would authorize the same kind of security measures as were invoked in World War II. During that war the Coast Guard had a similar screening program which summarily denied access to vessels to persons deemed to constitute a menace to the national security.

In any event the administrative construction of the Magnuson Act as authorizing this screening program has plainly been ratified by Congress. Each year since the passage of the Act the screening program has been brought to the attention of Congress and appropriations have been made to the Coast Guard to carry out the program.

III. The provisions of the Administrative Procedure Act as to the conduct of agency hearings and the making of agency adjudications are inapplicable to the screening program for two independent reasons:

(1) These requirements of the Administrative Procedure Act are applicable only where the statute involved requires the determination to be made "on the record" and "after opportunity for an agency hearing." The Magnuson Act has no such requirement. Both the legislative history of the Magnuson Act and

the Congressional ratification of the screening program indicate that the Commandant's determinations were to be made in part on the basis of confidential information from intelligence agencies and hence was not limited to a determination "on the record" in the Administrative Procedure Act sense. Likewise the legislative history of the Act and the Congressional ratification of the screening program indicate that Congress understands that the Commandant's initial determination as to security risk is to be made before, not "after opportunity for an agency hearing."

(2) These requirements of the Administrative Procedure Act are also inapplicable because the Commandant's determination of security risk involves the conduct of military and naval affairs, a field expressly excepted from these requirements of the Administrative Procedure Act. In the light of the fact that the Magnuson Act was enacted as a result of the Korean crisis and was designed to protect vessels carrying military supplies from sabotage, the close relationship of this security program to military affairs is obvious.

IV. The screening program as revised to comply with the decree below and this Court's decision in the *Gray* case does not violate the due process clause. This has in effect been already held by this court in its *Gray* decision.

(1) The fact that the Commandant's initial determination of security risk is made in advance of the administrative hearing does not violate due process. Since the seamen are given an adequate administrative hearing after the Commandant's initial determination, the requirements of due process are met.

(2) Nor is the due process clause violated by the fact that the names of those who give confidential information to the Coast Guard about seamen are not disclosed in the administrative process. To make such a disclosure would nullify the security program, as this Court recognized in its *Gray* decision.

(3) Likewise appellants have no constitutional right to confront and cross-examine the persons who have given the Coast Guard confidential information about them. The constitutional right of confrontation and cross examination of witnesses is applicable only to criminal proceedings, not to an administrative proceeding such as this.

## ARGUMENT

## I

### Appellants have failed to exhaust their administrative remedy

As stated above (p. 7), the Coast Guard regulations as revised shortly after the entry of the decree in this case provide appellants with the administrative remedy of a new appeal in which they will receive a specific statement of the basis of the Commandant's initial determination to deny them security clearance and a bill of particulars setting forth the acts, associations or beliefs which formed the basis for that determination. All of the appellants who have been denied clearance are presently availing themselves of this new administrative remedy and their appeals are in process (see p. 8, above).[5]

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[5] Appellants Payney and Kulper, having been granted clearance, obviously have no standing to prosecute this action. No justiciable controversy exists between them and appellees. *Doremus* v. *Board of Education,* 342 U. S. 429; *Amalgamated Association, etc.* v. *Wisconsin Employment Relations Board,* 340 U. S. 416; *Eccles* v. *Peoples Bank,* 333 U. S. 426, 431-4.

It may be that the outcome of these new appeals will be a determination by the Commandant that these appellants are not security risks. If so, the grievance of which they complain here will be completely remedied by the administrative process and there will be no occasion for their invoking judicial relief. In these circumstances this Court will not pass on appellants' contentions, at least until the pending administrative appeals are concluded.

As stated in *Aircraft & Diesel Equipment Corp.* v. *Hirsch,* 331 U.S. 752, 767:

> The doctrine, wherever applicable, does not require merely the initiation of prescribed administrative procedures. *It is one of exhausting them, that is, of pursuing them to their appropriate conclusion and correlatively, of awaiting their final outcome before seeking judical intervention.*
>
> The very purpose of providing either an exclusive or an initial and preliminary administrative determination is to secure the administrative judgment either, in the one case, in substitution for judicial decision or, in the other, as foundation for *or perchance to make unnecessary later judicial proceedings.* [Italics supplied.]

See also *Macauley* v. *Waterman Steamship Corp.,* 327 U.S. 540; *Myers* v. *Bethlehem Shipbuilding Corp.,* 303 U.S. 41; *Public Service Commission of Utah* v. *Wycoff Company,* 344 U.S. 237, 240-1, 246; *Federal Power Commission* v. *Arkansas Power & Light Co.,* 330 U.S. 802; *Securities and Exchange Commission* v. *Otis & Co.,* 338 U.S. 843; *Public Utilities Commission of California* v. *United Air Lines,* 346 U.S. 402.

The fact that appellants seek to raise constitutional issues is no ground for relaxing the requirement that they exhaust their administrative remedy before seeking judicial relief. Indeed, "the very fact that constitutional issues are put forward constitutes a strong reason for not allowing this suit either to anticipate or to take the place of [the administrative determination]. When that has been done, it is possible that nothing will be left of appellant's claim, asserted both in that proceeding and in this cause, concerning which it will have basis for complaint." *Aircraft & Diesel* case, *supra,* at page 772. In *Allen* v. *Grand Central Aircraft Co.,* — U.S. — (No. 450, Oct. term, 1953, decided May 24, 1954), the Supreme Court refused to rule on constitutional issues where the plaintiff had not exhausted its administrative remedy. See also *Franklin* v. *Jonco Aircraft Corp.,* 346 U.S. 868, in which the Supreme Court reversed, because of plaintiff's failure to exhaust its administrative remedy, an injunctive decree entered by a 3-judge district court in *Jonco Aircraft Corp.* v. *Franklin,* 114 F. Supp. 392 (N.D. Tex.), holding that the statute challenged in the action was unconstitutional.

The fact that the revised Coast Guard regulations did not become effective until after the entry of the decree below does not make the requirement of exhaustion of administrative remedies any less applicable. In *Hunter* v. *Beets,* 180 F. 2d 101 (C.A. 10), cert. den. 339 U.S. 963, the Court of Appeals reversed a judgment granting a writ of habeas corpus, on the ground of the petitioner's failure to exhaust an administrative remedy which first became available after judgment had been entered by the District Court. See also *McMahan*

v. *Hunter,* 179 F. 2d 661 (C.A. 10), to the same effect.

In *Gusik* v. *Schilder,* 340 U.S. 128, 133-4, the Supreme Court indicated that in such circumstances a court of appeals should hold the case under advisement until the outcome of the administrative proceedings. See also *Whelchel* v. *McDonald,* 340 U.S. 122, affirming *Welchel* v. *McDonald,* 176 F. 2d 260, 178 F. 2d 760 (C.A. 5), where the court of appeals withheld decision pending disposition of the administrative review.

The court below indicated that the doctrine of exhaustion of administrative remedies would not be applied where the seamen had gone through the proceedings before the local appeal board and were remitted to the remedy of an appeal before the national board in Washington. The court below stated that it would be unduly onerous to require an unemployed seaman to travel from San Francisco to Washington for a hearing "conducted pursuant to the same statute and regulations but before a board differently constituted" (Tr. 288-90; 112 F. Supp. 440-1). And see this Court's opinion in the *Gray* case, 207 F. 2d at 240, footnote 4. These considerations are not applicable to appellants' pending administrative appeals. That remedy cannot be so burdensome, for all of the appellants not already cleared are now resorting to it. Furthermore these administrative appeals are being conducted under the revised regulations, which give appellants new procedure deemed sufficient by the court below and by this Court in its *Gray* decision to meet the requirements of due process. Hence, there is no basis in the present stage of this case for finding any exception to the rule requiring the exhaustion of administrative remedies.

## II

**The screening procedure prescribed by the Coast Guard regulations is authorized by the Magnuson Act**

The Court below held that the Coast Guard regulations are "contemplated and authorized by the statute" (Tr. 292-3; 112 F. Supp. at 442). This Court apparently agrees with that conclusion, for presumably it would not have reached in its *Gray* decision the issue as to the constitutionality of the administrative procedure if it had considered that that case could have been disposed of on the non-constitutional ground that the screening was not authorized by the Magnuson Act. *Rescue Army* v. *Municipal Court,* 331 U.S. 549, 568-85; *Alabama State Federation of Labor* v. *McAdory,* 325 U.S. 450, 461. In any event appellants' contention is without merit.

1. *The legislative history of the Magnuson Act shows that the merchant seamen screening program was contemplated.* The report of the Senate Committee on Interstate and Foreign Commerce on S. 3859 (81st Cong., 2d sess.) describes the purpose of the bill in general terms as giving "the President the power to safeguard against destruction, loss, or injury from sabotage or other subversive acts to vessels, harbors, ports, and other water-front facilities" (S. Rep. 2118, 81st Cong., 2d sess.). The report of the House Committee on the Judiciary on H. R. 9215 (81st Cong., 2d sess.), similarly states in general terms that "the bill enables the President to take such protective steps as seem necessary in his opinion. * * * The bill extends its protection to ports and water-front facilities under the jurisdiction of the United States which are subjected

to hazard by reason of sabotage, subversion, or accidents" (H. Rep. 2740, 81st Cong., 2d sess.).[6]

The statements by Senator Magnuson, the sponsor of the bill, on the floor of the Senate plainly indicate that one of its purposes was to remove the danger of sabotage by subversive individuals:

> Furthermore, the bill will allow the President to invoke security measures on the waterfronts—that is to say, around the docks. In my opinion, the bill will have the dual effect of helping clean out whatever subversive influences may exist around the waterfronts and of protecting the country from sneak attacks of the sort I have mentioned. Some of the last strongholds of the Communists in this country exist in some of the waterfront unions, despite the efforts of patriotic maritime labor leaders to clean out some of those unions.
>
> *　　*　　*　　*　　*
>
> This measure will give the President the authority to invoke the same kind of security measures which were invoked in World War I and in World War II. (96 Cong. Rec. 10794-5.)
>
> It also has this purpose, which I think is a good one: As I have said before, the last stronghold of subversive activity in this country, in my opinion, or at least the last concentrated stronghold, has been around our water fronts. * * * This would give authority to the President to instruct the FBI, in cooperation with the Coast Guard, the

[6] The House passed its bill but immediately thereafter vacated its proceedings, laid the bill on the table and passed the Senate bill (96 Cong. Rec. 11221).

> Navy, or any other appropriate governmental agency, to go to our water fronts and pick out people who might be subversives or security risks to this country. I think it goes a long way toward taking care of the domestic situation, as related to this subject, particularly in view of the large amount of talk we have had in the Senate within the past few days about Communists. * * *
> (96 Cong. Rec. 11321.)

As the court below pointed out (Tr. 292, 112 F. Supp. at 442), the significance of Senator Magnuson's statement that the bill would authorize the President to invoke the same kind of security measures as were invoked in World Wars I and II is that during the second world war the Coast Guard summarily denied access to vessels and waterfront facilities to any person whose presence would "constitute a menace to the national security or to the safety of life or property" (Directive of the Commandant of the Coast Guard issued July 20, 1942, set out in the appendix, p. 44 below).

Accordingly, the legislative history of the Magnuson Act shows that it was intended to authorize a procedure for screening security risks in the merchant marine to avoid dangers of sabotage, espionage, etc.

2. *The security screening procedure under the Coast Guard regulations has been ratified by Congress.* Even if there were doubt as to whether the language and legislative history of the Magnuson Act demonstrate that the security risk screening procedure was authorized by that Act, any such doubt would be dispelled by the fact that Congress has plainly ratified that procedure. Each year since the enactment of the Magnuson Act Coast

Guard officials have testified before subcommittees of the appropriations committees about this screening procedure as one of the activities covered by the annual appropriation of funds for operating expenses of the Coast Guard.[7]

As an example, at the hearings before a subcommittee of the House Committee on Appropriations on the Treasury-Post Office Departments Appropriations for 1952, the Commandant of the Coast Guard testified:

> The port security program, initiated in October 1950, provided for an increase of 500 officers, 70 warrant officers, and 4,202 enlisted men. The estimate for 1952 contemplates carrying this program on a full year basis. The duties imposed on the Coast Guard under the above may be grouped into four operations, as follows:
>
> * * * * *
>
> (3) Prevention of subversives from sailing on merchant vessels of the United States. This will be accomplished by denying employment on American merchant vessels to merchant seamen who do not hold specially validated documents. These

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[7] All of the following references are to hearings before a subcommittee of the House Committee on Appropriations or of the Senate Committee on Appropriations, as indicated:

Second Supplemental Appropriation Bill for 1951, House Hearings, pp. 135-7, 142, 144;

Treasury-Post Office Departments Appropriations for 1952, House Hearings, pp. 139-40, Senate Hearings, pp. 34, 143, 172;

Treasury-Post Office Departments Appropriations for 1953, House Hearings, p. 211, Senate Hearings, p. 75;

Treasury-Post Office Departments Appropriations for 1954, House Hearings, pp. 431-4, Senate Hearings, p. 269;

Treasury-Post Office Departments Appropriations for 1955, House Hearings, pp. 448, 471-3, 503-5, Senate Hearings, pp. 341-2.

> special documents will be issued to seamen only, after a name clearance check with intelligence agencies. (Hearings, pp. 139-40).

In addition, the Annual Report of the Secretary of the Treasury for each year since the Magnuson Act has described the screening program.[8] Thus the 1952 Annual Report states (page 177):

> The port security program carrying out Executive Order 10173, which was begun in 1951 to provide for the safeguarding of vessels, harbors, ports, and waterfront facilities in the United States, was continued in 1952. The purpose of this program is the protection of waterfront facilities and of vessels in port. Under this program, measures to prevent sabotage include the security screening of seamen, longshoremen, pilots, and waterfront workers, and others required to have access to restricted waterfront facilities and vessels in port.
>
> Persons to be employed aboard merchant vessels are checked to determine whether they were security risks, and during the year 170,328 merchant mariners' documents bearing evidence of security clearance were issued to individuals. A total of 775 security appeal hearings was granted to those who were classed as poor security risks.
>
> In the other category of longshoremen, warehousemen, pilots, and waterfront workers, 196,951 persons were screened and 188,301 port security cards were issued, while 827 hearings were granted upon appeal by persons who had been found to be poor security risks.

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[8] 1951 Report, p. 135; 1952 Report, p. 177; 1953 Report, p. 148.

With this knowledge of the Coast Guard screening procedure before it, Congress has appropriated several million dollars each year to finance this program as part of the operating expenses of the Coast Guard.[9]

This repeated appropriation of funds to carry out the screening program is a plain case of legislative ratification of the administrative interpretation of the Magnuson Act as authorizing that program. *Ludecke* v. *Watkins,* 335 U. S. 160, 173 n. 19; *Fleming* v. *Mohawk Co.,* 331 U. S. 111, 116; *Brooks* v. *Dewar,* 313 U. S. 354, 361; *Isbrandtsen-Moller Co.* v. *United States,* 300 U. S. 139, 147.

Appellants' characterization of the screening procedure as an unauthorized "thought-control program" (Brief, p. 32) is mere invective. A seaman's views as to the righteousness of the communist cause, his associations with the Communist Party or with communist-front organizations are scarcely wholly irrelevant to the question of whether he is a security risk. *American Communications Assn.* v. *Douds,* 339 U. S. 382, 391 et seq.; *Adler* v. *Board of Education,* 342 U. S. 485; *Carlson* v. *Landon,* 342 U. S. 524, 535-6, 541; *Harisiades* v. *Shaughnessy,* 342 U. S. 581, 590-2; *Garner* v. *Board of Public Works of Los Angeles,* 341 U. S. 716, 720; *Dennis* v. *United States,* 341 U. S. 494, 497-8, 501-11; *Orloff* v.

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[9] Second Supplemental Appropriation Act, 1951 (64 Stat. 1223, 1227);

Treasury and Post Office Departments Appropriation Act, 1952 (65 Stat. 182, 185);

Treasury and Post Office Departments Appropriation Act, 1953 (66 Stat. 289, 291);

Treasury and Post Office Departments Appropriation Act, 1954 (67 Stat. 67, 69);

Treasury and Post Office Departments Appropriation Act, 1955 (68 Stat. 144, 146).

*Willoughby,* 345 U. S. 83, 89-92; *Galvan* v. *Press,* — U. S. — (No. 407, Oct. Term, 1953, decided May 24, 1953).

There is no showing on this record that the screening procedure is ever applied to deny clearance to seamen solely because of their innocent participation in communist or communist-front organizations or activities. Indeed the record indicates the contrary (Tr. 535, 537-8, 561-2). Hence *Wieman* v. *Updegraff,* 344 U. S. 183, has no application here.

Accordingly, the seamen screening procedure prescribed by the Coast Guard Regulations is authorized by the Magnuson Act.

## III

**The adjudication and hearings provisions of the Administrative Procedure Act are not applicable to the appeals hearings under the screening program**

The court below correctly held that the provisions of the Administrative Procedure Act as to the manner of conducting agency hearings and making adjudications (Act of June 11, 1946, 60 Stat. 237, 239, 241, 242, 5 U. S. C. 1004, 1006, 1007) are not applicable to the hearings given seamen before the Coast Guard appeal boards (Tr. 290-2; 112 F. Supp. at 441-2).[10]

The Administrative Procedure Act provides that its procedural requirements as to the conduct of agency hearings and the making of agency adjudications shall be applicable:

> In every case of adjudication required by statute to be determined on the record after opportunity

[10] This Court's decision in the *Gray* case made no reference to the applicability of the Administrative Procedure Act.

> for an agency hearing, except to the extent that there is involved * * * (4) the conduct of military, naval, or foreign affairs functions * * *. (5 U. S. C. 1004.)

As the court below pointed out (Tr. 291-2; 112 F. Supp. at 441-2), there are two independent grounds why the agency hearing requirements of the Administrative Procedure Act have no application to the screening program under the Coast Guard regulations: (1) the Commandant's determination that a seaman should be denied clearance is not "required by statute to be determined on the record after opportunity for an agency hearing"; and (2) this screening program involves "the conduct of military, naval, or foreign affairs functions" (5 U. S. C. 1004).

1. *The hearing requirements of the Administrative Procedure Act are inapplicable because the Commandant's determination as to whether a seaman is a security risk is not required by the Magnuson Act "to be determined on the record after opportunity for an agency hearing."* There is nothing in the text of the Magnuson Act requiring that the Commandant's determinations either be made "on the record" or "after opportunity for an agency hearing." The Act says nothing as to either record or hearing. Under the Coast Guard regulations the Commandant's initial determination as to a seaman's security clearance is made without any "record" at all (in the Administrative Procedure Act sense), for that determination is made on the basis of material in the Coast Guard files consisting largely of reports of Government intelligence agencies. As we have shown at pages 20-3, above, Congress has plainly ratified the Coast Guard interpretation that the Magnu-

son Act authorizes the Commandant's initial determination to be made not on the basis of a formal "record" and in advance of any hearing at all. Likewise the Commandant's determination of a seaman's appeal from an initial denial of security clearance is not limited to the evidence adduced at the hearing before the Appeal Board. Here also the Commandant considers confidential information from intelligence agencies.

As the court below pointed out (Tr. 292, 112 F. Supp. at 442) the legislative history of the Magnuson Act also shows that Congress did not intend to have the screening proceedings conducted pursuant to the Administrative Procedure Act, for Senator Magnuson stated that his bill would authorize the same kind of security measures as were resorted to in World War II, and those measures did not give the seaman any right to a hearing at all and did not require that the determination be made "on the record" in the Administrative Procedure Act sense (see pp. 19-20 above).

Accordingly, since the Magnuson Act does not require the Commandant's determination to be made "on the record after opportunity for an agency hearing," the requirements of the Administrative Procedure Act as to agency hearings and adjudications are inapplicable. *Herman* v. *Dulles,* 205 F. 2d 715, 717 (C. A. D. C.). [Administrative Procedure Act inapplicable to disciplinary proceedings against counsel practicing before agency]; *Sakis* v. *United States,* 103 F. Supp. 292, 309 (D. D. C.) [Act inapplicable to determination by Interstate Commerce Commission as to modification of railroad's financial structure]. See also *Fahey* v. *O'Melveny & Myers,* 200 F. 2d 420, 479 (C. A. 9) [Act inapplicable to orders of Home Loan Bank Board]; *Ken-*

*nedy Name Plate Co.* v. *Commissioner of Internal Revenue,* 170 F. 2d 196, 198 (C. A. 9), and *Cohen* v. *Commissioner of Internal Revenue,* 176 F. 2d 394, 396 (C. A. 10) [Act inapplicable to Tax Court proceedings]; *American Trucking Associations* v. *United States,* 344 U. S. 298, 318-20, and *Willapoint Oysters, Inc.* v. *Ewing,* 174 F. 2d 676, 692 (C. A. 9) [Act inapplicable to agency rule-making]; *Hiatt* v. *Compagna,* 178 F. 2d 42, 46 (C. A. 5) [Act inapplicable to hearings before federal Parole Board]; *Lesser* v. *Humphrey,* 89 F. Supp. 474 (M. D. Pa.) [Act inapplicable to proceedings before federal Good Time Board].

The legislative history of the Administrative Procedure Act also shows that the agency hearing and adjudication provisions of that Act are not applicable to adjudications under a statute such as the Magnuson Act which does not itself require the agency action to be taken "on the record after opportunity for an agency hearing." As stated in the Attorney General's Manual on the Administrative Procedure Act (1947), page 41:

> It will be noted that the formal procedure requirements of the Act are invoked only where agency action "on the record after opportunity for an agency hearing" is required by some other *statute.* The legislative history makes clear that the word "statute" was used deliberately so as to make sections 5, 7 and 8 applicable only where the Congress has otherwise *specifically* required a hearing to be held. Senate Hearings (1941), pp. 453, 577; Senate Comparative Print of June 1945, p. 7 (Sen. Doc. p. 22); House Hearings (1945), p. 33 (Sen. Doc. p. 79); Sen. Rep. p. 40 (Sen. Doc. p. 226); 92 Cong. Rec. 5651 (Sen. Doc. p. 359). Mere

statutory authorization to hold hearings (e. g., "such hearings as may be deemed necessary") does not constitute such a requirement. In cases where a hearing is held, although not required by statute, but as a matter of due process or agency policy or practice, sections 5, 7 and 8 do not apply. Senate Hearings (1941), p. 1456.[11]

As the court below stated (Tr. 291-2; 112 F. Supp. at 442), in *Wong Yang Sung* v. *McGrath,* 339 U.S. 33, relied on by appellants, these provisions of the Administrative Procedure Act were held applicable to deportation hearings of the Immigration Service merely because "the requirement of a formal hearing had been previously read into the deportation statute by the Supreme Court." That is not true of the Magnuson Act. In any event the force of the *Wong Yang Sung* decision has been minimized by the action of Congress in 1950 in providing that the hearing requirements of the Administrative Procedure Act should not be applicable to deportation proceedings [12] and in 1952 in providing a "sole and exclusive" procedure for the conduct of such hearings. [13]

2. *The hearing requirements of the Administrative Procedure Act are inapplicable because the Commandant's determination involved "the conduct of military,*

[11] The legislative history of the Administrative Procedure Act is compiled in Senate Document 248, 79th Congress, 2d Session, to which the "Sen. Doc." citations in the above quotation refer.

[12] Supplemental Appropriation Act, 1951 (64 Stat. 1044, 1048, formerly 8 U.S.C. 155a). See *Barber* v. *Yanish,* 196 F. 2d 53 (C.A. 9); *Belizaro* v. *Zimmerman,* 200 F. 2d 282 (C.A. 3); *United States* v. *Spector,* 343 U. S. 169, 178, footnote 6 (Jackson, J., dissenting).

[13] Section 242 (b) of the Immigration and Naturalization Act of 1952 (Act of June 27, 1952, 66 Stat. 163, 209-10, 8 U.S.C. 1252 (b)). See *Marcello* v. *Ahrens,* — F. 2d. — (C.A. 5), decided May 6, 1954 (22 L W 2541).

*naval, or foreign affairs functions.*" The court below further ruled that the agency hearing and adjudication provisions of the Administrative Procedure Act are not applicable to the Commandant's determinations because, as is indicated by the language of Executive Order 10173 issued under the Magnuson Act, the President, in authorizing the Coast Guard to establish this screening procedure "was operating in the area of military and naval affairs" (Tr. 291, 112 F. Supp. at 441). When it is considered that the Magnuson Act was enacted as a result of the Korean crisis, and was designed to protect vessels carrying military supplies from sabotage, this conclusion seems plainly correct.

Thus the Attorney General's Manual on the Administrative Procedure Act (p. 26) states with reference to the comparable exception contained in Section 4 of the Act (5 U.S.C. 1003):

> * * * The exemption for military and naval functions is not limited to activities of the War and Navy Departments but covers all military and naval functions exercised by any agency. Thus, *the exemption applies to the defense functions of the Coast Guard* and to the function of the Federal Power Commission under section 202 (c) of the Federal Power Act (19 U.S.C. 824a(c)). Sen. Rep. p. 39 (Sen. Doc. p. 225); Senate Hearings (1941) p. 502. [Italics supplied].

As to the military and naval affairs exemption contained in Section 5 of the Act (5 U.S.C. 1004), the one directly involved here, the Attorney General's Manual states (p. 45):

> * * * Both Committee reports state that the section "exempts military, naval, and foreign af-

fairs functions for the same reasons that they are exempted from section 4; and, in any event, rarely if ever do statutes require such functions to be exercised upon hearing." Sen. Rep. p. 16; H. R. Rep. p. 27 (Sen. Doc. pp. 202, 261). Thus, the exercise of adjudicatory functions by the War and Navy Departments or by any other agency is exempt to the extent that the conduct of military or naval affairs is involved Senate Hearings (1941) pp. 502-3. * * * [14]

Since the *Wong Yang Sung* decision, *supra,* did not pass on the scope of the military and naval affairs exception to the agency hearings and adjudication provisions of the Administrative Procedure Act, that decision has no application to this point.

Accordingly, the court below correctly held that the agency hearing and adjudication provisions of the Administrative Procedure Act have no application to the screening program under the Magnuson Act.

## IV

**The screening procedure provided by the decree below and the revised regulations of the Coast Guard do not deny seamen due process of law.**

Appellants argue that seamen are denied due process of law even under the revised procedure prescribed by the decree below, which has been put into effect by the revised Coast Guard regulations of October 27, 1953.

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[14] The report of the Senate Committee on the Judiciary on the bill which became the Administrative Procedure Act contains a letter from the Attorney General to the Chairman of the Committee commenting on the bill, which, states: "The term 'naval' in the first exception clause is intended to include the defense functions of the Coast Guard * * *" (S. Rep. 752, 79th Cong., 1st sess., p. 38; S. Doc. 248, 79th Cong., 2d sess., p. 225).

In making this argument, appellants studiedly ignore the fact that this Court in its *Gray* decision has already held that the screening procedure, as modified in the respects provided by the decree below, meets the requirements of the due process clause. We assume that this Court will adhere to its ruling in the *Gray* case and hence do not repeat here the detailed argument on the due process issue which was made in the Government's brief in the *Gray* case (Appeals Nos. 13499, 13500, 13501).

1. *Appellants are not denied due process by the fact that the Commandant's initial determination as to whether a seaman is a security risk is made prior to the administrative appeal hearing.* As the court below said: "Due process does not require that a hearing be granted at the initial stage of an administrative proceeding. In fact, public necessity of a much less pressing order than the prevention of espionage and sabotage has often been held to justify administrative orders or other action followed subsequently by a hearing [citing cases]" (Tr. 297-8, 112 F. Supp. at 444).

Since this same issue was involved in the *Gray* case, this Court presumably included the above-quoted ruling of the court below in its statement in the *Gray* case that "We are in general agreement with what Judge Murphy had to say on the subject [due process] in his opinion in Parker v. Lester, supra" (207 F. 2d at 241).

In any event the principle that due process requirements are met by giving an administrative hearing after administrative action is taken is firmly established. *Fahey* v. *Mallonee,* 332 U.S. 245, 253; *Inland Empire District Council* v. *Millis,* 325 U.S. 697, 710; *Yakus* v. *United States,* 321 U.S. 414, 436, 442-3; *Ewing* v. *Mytinger & Casselberry,* 339 U.S. 594, 598.

The Magnuson Act was enacted to deal with the acute security situation brought about by the Korean crisis. To have required advance hearings before several hundred thousand merchant seamen could be cleared and permitted to sail would have tied up the merchant marine for a substantial time when it was most urgently needed. "National security might not be able to afford the luxuries of litigation and the long delays which preliminary hearings traditionally have entailed." *Bowles* v. *Willingham,* 321 U.S. 503, 521.

Appellants' argument (Brief, p. 43) that the screening program has no genuine relationship to the prevention of espionage and sabotage has been disposed of at page 23, above. Appellants' statement (Brief, p. 43) that there is no denial that appellants would not engage in sabotage is incorrect. The complaint alleges that appellants have never committed espionage or sabotage, etc. (Tr. 34), but the answer denies these allegations for lack of knowledge or information sufficient to form a belief (Tr. 108). And appellants offered not one word of proof to support their allegations of innocence.

Furthermore the record shows that acts of sabotage on merchant vessels have occurred (Tr. 420-2). The Coast Guard has information that all four appellants who have not been cleared are either Communist Party members, or have engaged in activities to advance the interests of the Communist Party, such as distributing party literature, soliciting new party members, etc. (Tr. 103-8).

Accordingly, appellants' contention that the failure to grant them a hearing prior to the Commandant's initial determination denies them due process is without merit.

2. *Appellants are not denied due process by the fact that they are not given the source of the information against them.* The court below held that due process requires that a seaman be given reasonable notice of the basis of the Commandant's initial determination that he is a security risk and a bill of particulars giving him the contents of the testimony against him so that he will have an opportunity to rebut specific allegations of misconduct or other acts and associations which the Board considers probative, but that he is not entitled to the source of the information; i.e., the names of informers (Tr. 297-9, 112 F. Supp. at 443-4). Accordingly, the decree below specifically provides that the bill of particulars "need not set forth the source of such data, nor disclose the data with such specificity that the identity of any informers who have supplied such allegations or data will necessarily be disclosed * * *" (Tr. 339).

In its *Gray* decision this Court specifically approved this ruling by the court below in the present case, saying:

> * * * More particularly are we in accord with his [Judge Murphy's] conclusion that due process in the context of the screen program is properly definable in terms of the maximum procedural safeguards which can be afforded the individual without jeopardizing the national security.
>
> Permitting access to the material in the dossier of the Commandant concerning the individual denied clearance, or revelation of the names of the informants would very likely tend to dry up the sources of information. * * *

(207 F. 2d at 241.)

Appellants ignore this Court's ruling on this specific point in the *Gray* case and assert that they have a constitutional right to a disclosure of the complete confidential information in the Coast Guard files.

The record here establishes the correctness of this Court's view in the *Gray* case that a requirement of disclosure of the names of informers would nullify this security program (Tr. 567-8). Under such circumstances due process does not require the disclosure of such information. *United States* v. *Nugent*, 346 U.S. 1. See also *Elder* v. *United States,* 202 F. 2d 465, 468 (C.A. 9); *Bailey* v. *Richardson,* 182 F. 2d 46, 52, 57-8 (C.A. D.C.), affirmed by an equally divided court, 341 U.S. 918; *Kutcher* v. *Gray,* 199 F. 2d 783, 789 (C.A. D.C.); *Chicago & Southern Air Lines* v. *Waterman Corp.,* 333 U.S. 103, 111; *Norwegian Nitrogen Products Co.* v. *United States,* 288 U.S. 294.

The weakness of appellants' argument is demonstrated by the authorities upon which they rely. They quote from the dissenting opinion in *Shaughnessy* v. *United States ex rel. Mezei,* 345 U.S. 206, and concede that *United States ex rel. Accardi,* 347 U.S. 260, "went off on another point." The only other case they cite, *United States* v. *Edmiston,* 118 F. Supp. 238 (D. Neb.), was a criminal prosecution, as to which the Sixth Amendment imposes requirements not present here. see page 36, below.

Appellant's brief (page 44, footnote 14, and appendices) gives the impression that even under the revised Coast Guard regulations a seaman is not given a specific statement of the contents of the information against him. Appellants fail to inform the Court that upon protest by counsel as to the insufficiency of the

bill of particulars given appellant Parker counsel was informed by the Chairman of the local Appeal Board that his request for additional particulars was being referred to the Commandant, where it is now being processed (appendix, pages 48-9, below).

Accordingly, there is no merit in appellants' contention that the due process clause requires that seamen be given the names of those who have furnished information about them.

3. *Appellants have no constitutional right to confrontation and cross examination of witnesses against them.* Appellants' contention that they are entitled to confront and cross examine those who have given information against them is very closely related to the point just discussed; i.e., that they are not entitled to be given the source of the information against them.

The court below correctly ruled:

> In this context, then, I define due process in terms of the maximum procedural safeguards which can be afforded petitioners without jeopardizing the security program. At the outset, it must be remarked that opportunity for confrontation and cross-examination of adverse witnesses cannot be afforded a petitioner in these situations without destroying the security program. The Federal Bureau of Investigation has uniformly insisted that practically none of the evidential sources available will continue to be available to it if proper secrecy and confidence cannot at all times be maintained with respect to the original source of information. In view of the fact that Constitutional guarantees of confrontation and cross-examination are in terms applicable only to criminal trials, Joint

> Anti-Fascist Refugee Committee v. McGrath, 1951, 341 U. S. 123, 180, 70 S. Ct. 624, 95 L. Ed. 817, I conclude that in this instance, considerations in favor of protecting the investigatory tasks of governmental agencies outweigh the disadvantage flowing to the individual petitioners. (Tr. 297; 112 F. Supp. at 443-4.)

In its *Gray* decision this Court expressed approval of this ruling by the court below (207 F. 2d at 241), but appellants in their brief ignore that fact.

The constitutional right to confrontation and cross examination of witnesses is applicable only to criminal proceedings, not to an administrative proceeding such as is here involved. Sixth Amendment; *Bhagat Singh* v. *McGrath,* 104 F. 2d 122 (C.A. 9); *Bailey* v. *Richardson, supra.*

Appellants are unable to cite a single case holding that the right to confrontation and cross examination of witnesses is applicable to a proceeding of this sort. Their authorities consist merely of a general statement by Wigmore as to the value of cross examination, the dissenting opinion in *United States* v. *Nugent,* 346 U.S. 1, and a press report of a recent statement by Senator McCarthy.

Accordingly, appellants have no constitutional right to confront and cross examine the persons who have given the Coast Guard information about them.

## CONCLUSION

Appellants have failed to exhaust the new administrative remedy given them by the revised Coast Guard regulations. The Coast Guard screening procedure is authorized by the Magnuson Act. The Administrative

Procedure Act has no application to the appeals hearings under the screening program. Finally, the screening procedure as revised by the Coast Guard to comply with the decree below and this Court's opinion in *United States* v. *Gray* does not deny appellants due process of law.

The judgment below should be affirmed.

Respectfully submitted,

WARREN E. BURGER,
*Assistant Attorney General.*
LLOYD H. BURKE,
*United States Attorney.*
PAUL A. SWEENEY,
*Attorney, Department of Justice.*
DONALD B. MACGUINEAS,
*Attorney, Department of Justice,*
*Attorneys for Appellees.*

APPENDIX

## Affidavit
of
## Captain James D. Craik, U. S. C. G.

District of Columbia, ss.

Captain James D. Craik, United States Coast Guard, being first duly sworn on oath, deposes and says that he is Chief, Merchant Vessel Personnel Division, Office of Merchant Marine Safety, United States Coast Guard Headquarters, Washington, District of Columbia, and in such capacity is custodian of the official records of the United States Coast Guard relating to regulations for Security Check and Clearance of Merchant Marine Personnel (33 CFR 121) under the Magnuson Act; that he has examined such records, including those of Lawrence Everett Parker, Fred Harry Kulper, Theodore William Rolfs, Claude F. Payney, Peter Mendelsohn, and Harold Ray Fontaine, plaintiffs in the suit of Parker v. Lester, No. 30484 in the District Court for the Northern District of California, and found:

(1) That Lawrence E. Parker was screened off the SS President Cleveland on 1 February 1951; that the said Parker filed an appeal on 5 February 1951; that an Interim Local Appeal Board heard the appeal on 30 March 1951; that the said Parker was notified by the Commandant of the Coast Guard by letter dated 16 May 1951, that his appeal had been rejected; that by letter dated 11 June 1951, signed by his Attorney, Richard Gladstein, Parker specifically requested that a hearing before the National Appeal Board not be scheduled; that in effect no appeal was sought from 11 June 1951 until 15 December 1953; that during the aforementioned

interim further appeals were provided for by the President's Executive Order No. 10173, as amended by Executive Order No. 10277; that on 15 December 1953, the said Parker requested an appeal hearing and that he be furnished with a Bill of Particulars in accordance with the provisions of 33 CFR 121 and 125, as amended by 18 Federal Register 6941-6942; that pursuant to the said request the said Parker on 11 February 1954 was furnished with the requested Bill of Particulars and was advised that his appeal hearing was scheduled before a Tripartite Local Appeal Board on 6 April 1954; that by letter dated 16 March 1954 the said Parker, through his attorney, requested postponement of the scheduled appeal hearing and requested that additional particulars and clarification of the Bill of Particulars be furnished him; that the request for the postponement of the scheduled appeal hearing was granted; that the request for additional particulars and clarification of the Bill of Particulars is now being processed; that such processing involves checking back with the agencies that originally furnished the derogatory information; that Parker's appeal hearing is now pending; that no date for such hearing has been set;

(2) That Fred Harry Kulper, was screened off the SS Indian Head as a security risk on 12 April 1951; that the said Kulper filed an appeal on 13 April 1951; that this appeal came on to be heard by a Tripartite Local Appeal Board on 6 September 1951; that the said Kulper was notified by the Commandant of the Coast Guard by letter dated 12 October 1951 that he had been granted security clearance;

(3) That Theodore William Rolfs was screened off the SS President Cleveland on or about 19 September

APPENDIX

## Affidavit
## of
## Captain James D. Craik, U. S. C. G.

District of Columbia, ss.

Captain James D. Craik, United States Coast Guard, being first duly sworn on oath, deposes and says that he is Chief, Merchant Vessel Personnel Division, Office of Merchant Marine Safety, United States Coast Guard Headquarters, Washington, District of Columbia, and in such capacity is custodian of the official records of the United States Coast Guard relating to regulations for Security Check and Clearance of Merchant Marine Personnel (33 CFR 121) under the Magnuson Act; that he has examined such records, including those of Lawrence Everett Parker, Fred Harry Kulper, Theodore William Rolfs, Claude F. Payney, Peter Mendelsohn, and Harold Ray Fontaine, plaintiffs in the suit of Parker v. Lester, No. 30484 in the District Court for the Northern District of California, and found:

(1) That Lawrence E. Parker was screened off the SS President Cleveland on 1 February 1951; that the said Parker filed an appeal on 5 February 1951; that an Interim Local Appeal Board heard the appeal on 30 March 1951; that the said Parker was notified by the Commandant of the Coast Guard by letter dated 16 May 1951, that his appeal had been rejected; that by letter dated 11 June 1951, signed by his Attorney, Richard Gladstein, Parker specifically requested that a hearing before the National Appeal Board not be scheduled; that in effect no appeal was sought from 11 June 1951 until 15 December 1953; that during the aforementioned

interim further appeals were provided for by the President's Executive Order No. 10173, as amended by Executive Order No. 10277; that on 15 December 1953, the said Parker requested an appeal hearing and that he be furnished with a Bill of Particulars in accordance with the provisions of 33 CFR 121 and 125, as amended by 18 Federal Register 6941-6942; that pursuant to the said request the said Parker on 11 February 1954 was furnished with the requested Bill of Particulars and was advised that his appeal hearing was scheduled before a Tripartite Local Appeal Board on 6 April 1954; that by letter dated 16 March 1954 the said Parker, through his attorney, requested postponement of the scheduled appeal hearing and requested that additional particulars and clarification of the Bill of Particulars be furnished him; that the request for the postponement of the scheduled appeal hearing was granted; that the request for additional particulars and clarification of the Bill of Particulars is now being processed; that such processing involves checking back with the agencies that originally furnished the derogatory information; that Parker's appeal hearing is now pending; that no date for such hearing has been set;

(2) That Fred Harry Kulper, was screened off the SS Indian Head as a security risk on 12 April 1951; that the said Kulper filed an appeal on 13 April 1951; that this appeal came on to be heard by a Tripartite Local Appeal Board on 6 September 1951; that the said Kulper was notified by the Commandant of the Coast Guard by letter dated 12 October 1951 that he had been granted security clearance;

(3) That Theodore William Rolfs was screened off the SS President Cleveland on or about 19 September

1950; that the said Rolfs ignored this notification of his ineligibility and successfully served aboard the SS Lurline from 24 October 1950 to 4 November 1950; that said Rolfs was screened on 6 November 1950 from re-signing articles on the SS Lurline; that the said Rolfs acting on the fact that he was screened from the SS President Cleveland, filed an appeal on 30 September 1950; that the appeal came to be heard by an Interim Local Appeal Board on 1 December 1950; that the said Rolfs was advised by the Commandant of the Coast Guard by letters dated 15 December 1950, 11 April 1951 and 1 May 1951 that his appeal was rejected; that the said Rolfs filed a second appeal on 18 November 1951; that the appeal came on to be heard by a Tripartite Local Appeal Board on 14 January 1952; that the said Rolfs was advised by the Commandant of the Coast Guard by letter dated 13 March 1953 that his appeal was rejected; that the said Rolfs did not file further appeal from 13 March 1953 until 28 November 1953, as permitted under the Provisions of Executive Order 10173, as amended by Executive Order 10277; that on 28 November 1953, the said Rolfs requested an appeal hearing and that he be furnished with a Bill of Particulars in accordance with the provisions of 33 CFR 121 and 125, as amended by 18 Federal Register 6941-6942; that on 21 April 1954, having been duly furnished with a Bill of Particulars, the said Rolfs' appeal was heard by a Tripartite Local Appeal Board; that the final report and recommendation of the Tripartite Local Appeal Board is now pending.

(4) That Claude F. Payney, was screened off the SS Brainerd Victory on or about 11 November 1950, the SS Wayne Victory on or about 20 December 1950 and the SS Mormacsun on or about 28 February 1951;

that having been furnished with an official notification of his ineligibility to serve aboard U.S. Merchant vessels under the provisions of Executive Order No. 10173, together with instructions for effecting an appeal, Payney ignored this notification and attempted to serve aboard four (4) vessels prior to his appeal hearing; that as a result of this attempt to evade the notificaton of ineligibility Payney was successfully able to serve aboard the SS JULIA LUCKENBACH from 17 January 1951 to 30 January 1951; and aboard the SS MORMACSUN from 9 February 1951 to 26 February 1951; that the said Payney filed an appeal on 12 January 1951; that this appeal came on to be heard before an Interim Local Appeal Board on 9 March 1951; that the said Payney was notified by the Commandant of the Coast Guard by letter dated 5 April 1951 that he had been granted security clearance;

(5) That Peter P. Mendelsohn was screened off the SS LURLINE on 6 November 1950; that the said Mendelsohn filed an appeal on or about 5 January 1951; that this appeal came on to be heard by an Interim Local Appeal Board on 16 February 1951; that the said Mendelsohn was notified by the Commandant of the Coast Guard by letter dated 2 April 1951 that his appeal has been rejected; that the said Mendelsohn filed an appeal on 13 July 1951; that this hearing was not scheduled prior to the Mendelsohn's conviction on 3 March 1953 for violation of Section 1001, Title 18, United States Code; that no further communication was had with the said Mendelsohn until 30 November 1953 when he reappealed; that on 8 April 1954, having been duly furnished with a Bill of Particulars, the said Mendelsohn's appeal was heard by a Tripartite Local Appeal Board; that the final report and recommenda-

tion of the Tripartite Local Appeal Board is now pending.

(6) That Harold Roy Fontaine, was denied the issuance of a validated U.S. Merchant Mariner's Document on 19 February 1951; that the said Fontaine filed an appeal on 19 February 1951; that this appeal came on to be heard by an Interim Local Appeal Board on 23 April 1951; that the said Fontaine was notified by the Commandant of the Coast Guard by letter dated 12 July 1951 that his appeal had been rejected; that the said Fontaine did not file further appeal from 12 July 1951 until 22 December 1953, as permitted under the provisions of the President's Executive Order No. 10173, as amended by Executive Order No. 10277; that such failure to appeal precluded further review of his case by the National Appeal Board; that on 22 December 1953 Fontaine reappealed and requested a Bill of Particulars; that a Bill of Particulars was forwarded to San Francisco on 1 March 1954; that an appeal hearing before a Tripartite Local Appeal Board is now pending.

(7) That the statistical summary of the Coast Guard Security Program as of 14 May 1954 is as follows:

STATISTICAL SUMMARY

COAST GUARD SECURITY PROGRAM

MERCHANT SEAMAN

as of 14 May 1954

| | |
|---|---|
| Total Seamen Screened | 392,243 |
| Cleared Initially | 381,498 |
| Cleared Initially—by Review Board on Evaluation of Information | 7,599 |
| Denied Initially | 3,146 |

| | |
|---|---|
| Appeals by Seamen to Local Appeal Board.... | *1,817 |
| Cleared ........................... | **989 |
| Denied ........................... | ***668 |
| Appeals to National Appeal Board........... | 412 |
| Cleared ........................... | 205 |
| Denied ........................... | 207 |
| Pending ........................... | 0 |
| Seamen cleared on appeal and then later denied due to further derogatory information...... | 4 |
| Appeal Board recommendations Overruled by Commandant (Seamen): | |
| (a) Local Appeal Board—Favorable Recommendations ............... | 10 |
| (b) Local Appeal Board—Unfavorable Recommendations ............... | 2 |
| Total Seamen in Denial Status............... | 1,952 |
| Total Seamen Appeals Pending............. | 160 |

JAMES D. CRAIK,
*Captain, U. S. Coast Guard,*
*Chief, Merchant Vessel,*
*Personnel Division.*

Subscribed and sworn to this 1st day of June, 1954, in the District of Columbia, before me, the undersigned, a notary public in and for the District of Columbia, as witness my hand and official seal.

EDWARD S. SHANKLE,
[SEAL.] *Notary Public, District of Columbia.*

My Commission Expires Sept. 30, 1957.

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* 13 having second appeal heard at Tripartite level
** 4 having second appeal heard at Tripartite level
*** 9 having second appeal heard at Tripartite level

## Appendix AAA

Headquarters, United States Coast Guard,

Washington, 20 July 1942

From: Commandant.

To: District Coast Guard Officers.

Subject: Policy governing denial of access to, or removal of persons from, vessels or waterfront facilities.

Reference: (a) Commandant's Order of 12 May 1942 (CO-661-621-601).

Enclosure: (A) Form for notice of removal or exclusion.

1. Reference (a) is hereby canceled and the following is substituted therefor. District Coast Guard Officers are charged with the responsibility of determining whether or not a person shall be denied access to or be removed from a vessel or waterfront facility. As used in this letter, the term "waterfront facility" is limited to piers, wharves, docks, and similar structures extending beyond the bulkhead line to which vessels may be secured, buildings on such structures extending beyond the bulkhead line to which vessels may be secured, buildings on such structures or contiguous to them, and equipment and materials on such structures or in such buildings. Authority for such denial and removal is found in section 6.4 (a) of the regulations issued pursuant to section 1, title II of the so-called Espionage Act of June 15, 1917 (40 Stat. 220; U. S. C., title 50, sec. 191), and the Order of the Commandant of the Coast Guard dated April 15, 1942, issued pursuant to Executive Order No. 9074.

2. Before reaching a decision to remove or exclude from a merchant vesel or waterfront facility any individual, either as an employee or in any other status, the District Coast Guard Officer shall have found reasonable grounds to believe that the individual is one:

(a) Who would engage in sabotage of the vessel or waterfront facility, or

(b) Who would engage in espionage, or

(c) Who has subversive inclinations indicated by pro-Axis statements or actions, or

(d) Who has a criminal record of such nature as would indicate that his presence in a vessel or on a waterfront facility would lead to serious hazard, or

(e) Who is habitually unfit for duty on board ship by reason of drunkenness, or

(f) Who is mentally incapacitated, or

(g) Whose presence on board a vessel or on a water-front facility would, for any reason not listed herein, constitute a menace to the national security or to the safety of life or property.

3. District Coast Guard Officers are not justified in denying access or removal of persons because of any bona fide labor activities. They shall base their action on public security and safety of life and property. The Commandant desires to emphasize the seriousness of the action authorized by these instructions and he relies upon District Coast Guard Officers to give most careful consideration to all information available before taking the action provided for herein.

4. For emphasis, it is repeated that the responsibility for removal or exclusion rests with the District Coast

Guard Officer, but it shall be the duty of the Captain of the Port to bring to the attention of the District Coast Guard Officer any case within the purview of paragraph 2, with appropriate recommendations. The District Coast Guard Officer may delegate authority to individual Captains of Ports to exercise this authority for him in cases when there is not sufficient time to place the facts before the District Coast Guard Officer without delaying commerce or military movements. If time permits, the District Coast Guard Officer may interview the person concerned prior to ordering his removal or exclusion. Whenever any person is removed or excluded he shall be given by the District Coast Guard Officer or the Captain of the Port, a written statement of the reasons for the action taken, and if the individual so requests, a copy of such statement shall be sent to his designated representative. This statement shall be confined to the reasons for removal or exclusion of the individual and shall not contain evidence or sources of information. A form for such such written statement is appended (enclosure (A)). In no case will seamen's certificates or licenses, lawfully in their possession, be taken from them except through the procedure provided by R. S. 4450, as amended.

5. All cases of denial of access to vessels or removal from vessels shall be reported immediately to headquarters by dispatch with a statement of the reasons therefor, and a full report shall be forwarded to headquarters by mail as soon as possible. A person who has been denied access to or removed from a vessel may, if he desires to submit statements or evidence in his behalf, present such statements or evidence to the

District Coast Guard Officer, or in a port where there is no District Coast Guard Officer, to the Captain of the Port. The District Coast Guard Officer or the Captain of the Port, as the case may be, will if practicable, interview the man concerned and forward the statements or evidence in the case to the Commandant with his recommendations. If the evidence is submitted to a Captain of a Port, he will forward the evidence with his comment via the District Coast Guard Officer. All cases of denial or removal will be reviewed by the Commandant, United States Coast Guard, and his action will be final. If the Commandant concludes that exclusion is not necessary in a particular case, he will so inform the District Coast Guard Officer who ordered the removal or denial and also will inform the individual concerned. When the Commandant, after careful consideration, finds that the best interests of the United States require that an individual be excluded from merchant vessels, his findings will be made known to the person concerned and to all District Coast Guard Officers.

R. R. WAESCHE.

## NOTICE OF REMOVAL OR EXCLUSION FROM VESSEL OR WATERFRONT FACILITY

——— ———,

(Name of person)

Under the authority vested in me by section 6.4(a) of the regulations issued pursuant to section 1, title II, of the so-called Espionage Act of June 15, 1917 (40 Stat. 220; U.S.C., title 50, sec. 191), and the Order of the Commandant of the U. S. Coast Guard dated 15

April 1942, issued pursuant to Executive Order No. 9074, I have this day
(removed)
(excluded) you from.................. (insert name of vessel or waterfront facility) at (name of place), for the following reasons: ..........................
..................................................
..................................................
..................................................
..................................................

......................U.S. Coast Guard,
District Coast Guard Officer.
..........................Naval District
or
......................U.S. Coast Guard,
Captain of the Port.

.............................
(Date)

---

Chairman, Local Appeal Board,
1111 Times Building,
Long Beach, California.

24 March, 1954.
GN/A8 (LB 445).

Lloyd E. McMurray, Esq.,
Gladstein, Andersen & Leonard,
240 Montgomery Street,
San Francisco 4, California.

Re: Laurence E. Parker

Dear Sir:

This will acknowledge your letter, dated 19 March, 1954, addressed to Tilden H. Edwards, received from

him this date confirming the transfer of subject appeal from San Francisco to Long Beach, which was accomplished in accordance with your oral request to Mr. Edwards, as appears from my letter to Mr. Parker dated 19 March, 1954, a copy of which was forwarded to you.

This will also acknowledge your request for further particulars dated 16 March, 1954, addressed to Mr. Edwards, which, in view of the transfer of the appeal to Long Beach, I accept as addressed to me.

Inasmuch as the amended rules direct the Commandant of the Coast Guard to prepare the bill of particulars in each of these matters, it is my opinion that the Chairman of the Local Appeal Board is without authority to act on your request for further particulars and that the sole power to do so rests with the Commandant. Accordingly, your request for further particulars submitted on behalf of Mr. Parker has been forwarded to the Commandant for whatever action he may deem appropriate.

I will assume that you will not wish to appear before the Local Appeal Board until after the Commandant has acted upon this motion.

Very truly yours,

(S.) RICHARD K. GOULD,
*Chairman, Local Appeal Board.*

☆ U. S. GOVERNMENT PRINTING OFFICE: 1954 302585 1436